

paves the way for grant of a pending application<sup>20/</sup> for Commission consent to transfer control of ETC to a subsidiary of Amcell, which TDS had previously petitioned to deny.<sup>21/</sup> Accordingly, the parties requested the postponement of discovery and hearing dates to facilitate finalization of their settlement.<sup>22/</sup> By letter dated March 28, 1995, the parties informed the Presiding Judge that they had reached a final settlement.<sup>23/</sup>

5. In a Joint Motion filed May 17, 1995<sup>24/</sup>, the parties, including the WTB, requested a second continuance of procedural dates to allow them until June 30, 1995 to file a joint motion for summary decision. The Presiding Judge granted the Joint Motion by an order released May 22, 1995.<sup>25/</sup> On June 29, 1995, the parties filed a Request For Establishment of Procedural Date For Filing of Joint Motion For Summary Decision, requesting until July 14, 1995 to submit the joint motion for summary decision. The Presiding Judge granted the Request by order released July 5, 1995.<sup>26/</sup>

6. As the Joint Motion noted, ETC, Amcell and TDS cooperated with the WTB in undertaking extensive discovery. A total of 68 boxes of documents were produced by Amcell

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<sup>20/</sup> File No. 08715-CL-TC-01-92.

<sup>21/</sup> Pre-hearing conference Tr. 24.

<sup>22/</sup> Id. at 29.

<sup>23/</sup> Letter from Louis Gurman et al. to Administrative Law Judge Chachkin of March 28, 1995.

<sup>24/</sup> Amcell, TDS and WTB, Joint Motion for Extension of Time to File Motion for Summary Decision and for Continuance of Procedural Dates, filed May 17, 1995 ("Joint Motion").

<sup>25/</sup> Memorandum Opinion and Order, FCC 95M-129, released May 22, 1995.

<sup>26/</sup> Memorandum Opinion and Order, FCC 95M-156, released July 5, 1995.

and Thompson. Amcell alone produced 108,535 pages of documents, including over 10,000 checks written for the Atlantic City system. Ellis Thompson and ETC together produced over 18,000 pages of documents. Additionally, TDS produced over 1,200 pages of documents. Thirteen individuals were deposed, including Thompson, David Lokting (Thompson's attorney and business advisor), ten current or former Amcell employees, and Michael Riley,<sup>27/</sup> a consultant to the cellular industry with experience in managing cellular systems. Based on such discovery, and pursuant to the Presiding Judge's May 22 order, Thompson, Amcell, and the WTB are filing the instant Motion for Summary Decision.

## **II. SUMMARY DECISION**

7. Section 1.251 of the Commission's rules requires that a party seeking summary decision "show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing."<sup>28/</sup> As

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<sup>27/</sup> Michael Riley was retained by ETC as an expert witness in this proceeding. He began his career in the telecommunications industry at Motorola, where for over eight and a half years he held various positions in finance, service and sales capacities. He has held various positions in non-wireline cellular licensees, including director of marketing and vice-president of operations at Metro-Mobile, previously one of the larger non-wireline carriers in the nation. In those capacities, he has had extensive experience in the management of cellular systems pursuant to turnkey agreements and switch-sharing arrangements. In addition, he has done independent consulting for cellular licensees in the development and implementation of their systems. He is currently employed by Motorola as the director of worldwide operations for their 23 cellular licensees around the world. Riley Dep. Tr. page 6, line 2 through page 9, line 18.

<sup>28/</sup> 47 C.F.R. §1.251(a)(1); see also Summary Decision Procedures, 34 FCC 2d 485 (1972).

developed through Commission precedent, summary decision may only be granted when "the truth is clear, the basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts."<sup>29/</sup>

8. Such is the case here. None of the facts set out below are disputed by any party and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. As previously noted, discovery in this proceeding has been thorough and extensive. Proceeding with the hearing would add nothing to the record and would constitute an unnecessary drain on the Commission's scarce resources.<sup>30/</sup> In this regard, the Presiding Judge's observation questioning the need for a hearing in a similarly situated case is apposite:

For what purpose? The deponents have given consistent testimony. No evidence has been offered contradicting their accounts.<sup>31/</sup>

Thus, summary decision is appropriate where, as here, there remains no issue of fact to be resolved at hearing.

9. As noted above, the sole issue to be resolved under the HDO is whether Amcell is a "real-party-in-interest" to ETC's application. However, the designation of a real-party-in-interest issue in this case, particularly in light of the concerns expressed in the HDO, is somewhat misleading. Traditionally, "[a] real party in interest inquiry is relevant only to an undisclosed interest in an application, not a license."<sup>32/</sup> It is clear from a reading of the HDO that, in this

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<sup>29/</sup> Big Country Radio, Inc., 50 FCC 2d 967, 968 (Rev. Bd. 1975).

<sup>30/</sup> See Big Country Radio, Inc. at 968.

<sup>31/</sup> Weyburn Broadcasting Limited Partnership, 5 FCC Rcd 3812, n.4 (ALJ Chachkin June 26, 1990) (granting summary decision).

<sup>32/</sup> Brian L. O'Neill, 6 FCC Rcd 2572, 2574 (1991) ("O'Neill"). See also La Star Cellular Telephone Company, 9 FCC Rcd 7108, 7109 (1994) ("La Star").

case, the Commission's concerns arise principally from the period following the grant of Thompson's application, during which Thompson constructed and began operating his system as a licensee.<sup>33/</sup> There never has been any issue as to the real owner of Thompson's application during its prosecution. The record shows that -- except for certain non-controlling minority ownership claims in the application (in the aggregate 49.99%), arising from a reported pre-lottery settlement<sup>34/</sup> -- Thompson was the sole owner of his application and was solely responsible for its prosecution, paying \$10,000 in preparation and filing fees out of his own funds.<sup>35/</sup> While Amcell and TDS have both purchased interests in the application from minority interest holders under the settlement agreement, Thompson has always retained his 50.01% controlling share.<sup>36/</sup> Moreover, in their previous filings with the Commission, Thompson, ETC, and Amcell have each disclosed to the Commission that Amcell and TDS were purchasing the minority ownership claims.<sup>37/</sup> The HDO expresses no concern about these reported interests.

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<sup>33/</sup> HDO at 7140-43. Under Part 22 of the Commission's Rules, when a cellular application is granted, the applicant receives a radio station construction authorization which entitles the holder to construct the approved facilities. Upon completion of construction and the filing of a notification Form 489, the authorization ripens into a license. See 47 C.F.R. §§ 22.3, 22.132, and 22.142. However, because TDS filed a petition against the grant of the authorization, Thompson's license never became final.

<sup>34/</sup> On June 9, 1986, Thompson amended his application to inform the Commission of his participation in a partial settlement agreement among Atlantic City applicants organized by Cellular Management Services, Inc. Amendment of Application of Ellis Thompson, File No. 14261-CL-P-134-A-86, filed June 9, 1986.

<sup>35/</sup> Thompson Dep. Tr. page 48, lines 19 - 24.

<sup>36/</sup> HDO at 7138.

<sup>37/</sup> See, e.g., Amcell, Petition for Conditional Grant, filed January 11, 1988, page 3 n.4; Ellis Thompson, Response to Petition for Conditional Grant, filed January 25, 1988, page 3 n.5; ETC, Application for Modification, Exhibit 2, filed Jan 18, 1989.

10. Instead of applicant ownership, the HDO focuses on whether, during the post-application period, Thompson transferred de facto control of his system to Amcell. In making determinations regarding the control of common carrier facilities, the Commission uses the criteria set forth in Intermountain Microwave.<sup>38</sup> The six Intermountain factors are:

- (1) Does the licensee have unfettered use of all facilities?
- (2) Who controls daily operations?
- (3) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
- (4) Who is in charge of employment, supervision, and dismissal of personnel?
- (5) Who is in charge of the payment of financing obligations, including expenses arising out of operation?
- (6) Who receives monies and profits from the operation of the facilities?

11. The parties submit that the facts adduced through discovery, which are set forth in detail below, when applied to the above-listed criteria, conclusively demonstrate that Thompson has not relinquished control of his system and that the designated issue should be resolved in Thompson's favor.

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<sup>38/</sup> 24 Rad. Reg. (P & F) 983, 984 (1963) ("Intermountain").

### III. THE FACTS

#### A. The Application Period (February 5, 1986 - June 24, 1988)

##### 1. Ownership of Thompson's Application

12. In early 1986, Ellis Thompson, then a 68 - year old retired welder residing in Portland, Oregon,<sup>39/</sup> asked a broker about the possibility of investing in the cellular radiotelephone industry.<sup>40/</sup> He was told that he could buy applications for the lottery for cellular Markets 121-150 to be held by the FCC on April 21, 1986. Thompson decided to enter the lottery and filed applications with the FCC on February 5, 1986 for three markets, including the Atlantic City MSA.<sup>41/</sup>

13. Thompson had previously owned and operated several businesses including two service stations and a garage.<sup>42/</sup> Thompson believed that if any of his applications were selected in a lottery, he had the business capability to hire the necessary experts to assist him in constructing and operating a cellular system.<sup>43/</sup>

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<sup>39/</sup> Thompson Dep. Tr. page 10, lines 2-4.

<sup>40/</sup> Thompson Dep. Tr. page 9, lines 7-20; Thompson Decl. ¶ 2 (attached hereto as Exhibit 17).

<sup>41/</sup> Thompson Dep. Tr. page 13, lines 22-24.

<sup>42/</sup> Thompson Dep. Tr. page 8, lines 23-25.

<sup>43/</sup> Thompson Decl. ¶ 2.

14. Thompson paid \$10,000 for his three applications.<sup>44/</sup> All of that money was his own.<sup>45/</sup> Amcell played no role in the application process, nor were there any other parties with ownership interests in Thompson's original application at the time of filing.<sup>46/</sup>

15. On April 21, 1986, the Commission selected Thompson's application in the lottery for award of the non-wireline license for the Atlantic City MSA.<sup>47/</sup> On June 13, 1986, the Commission named Thompson as "tentative selectee" for the market and placed Thompson's application on public notice.<sup>48/</sup>

## 2. The CMS Agreement

16. On April 7, 1986, prior to his selection as the tentative selectee for the Atlantic City MSA, Thompson entered into a settlement agreement managed by Cellular Management Services, Inc. ("CMS Agreement"), through which he and other applicants for the Atlantic City MSA pooled their competing applications.<sup>49/</sup> Under the CMS Agreement, when Thompson became the tentative selectee, the ownership interest in his application was to be divided among Thompson, who was to retain a majority 50.01% controlling interest, and 143 other signatories,

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<sup>44/</sup> Thompson Dep. Tr. page 48, line 19.

<sup>45/</sup> Thompson Dep. Tr. page 48, line 21.

<sup>46/</sup> Thompson Dep. Tr. page 48, line 22 through page 49, line 2.

<sup>47/</sup> Public Notice, Mimeo No. 4024, released April 23, 1986.

<sup>48/</sup> Public Notice, Report No. CI-86-193, released June 13, 1986.

<sup>49/</sup> Thompson Dep. Tr. page 41, line 16 through page 42, line 9; CMS Agreement §§ 3.1-3.3 (attached hereto as Exhibit 14).

each of whom was to obtain a pro rata share of the remaining 49.99%.<sup>50/</sup> The CMS Agreement was consistent with Commission policy.<sup>51/</sup>

17. Under the CMS Agreement, Thompson was also required to finance, construct, and operate the Atlantic City system, all in accordance with Part 22 of the Commission's Rules.<sup>52/</sup>

18. The CMS Agreement contains a supermajority provision, Section 3.4(b), which prohibited Thompson from transferring control of the system without the approval of owners holding at least two-thirds of the equity.<sup>53/</sup> As shown below, this provision ultimately became a source of controversy between Amcell and TDS, each of whom acquired rights to minority interests from the original parties to the CMS Agreement. TDS petitioned the Commission to condition the grant of Thompson's application upon abrogation of Section 3.4(b),<sup>54/</sup> but the Commission denied the request, holding that the two-thirds provision was a typical minority investor protection provision.<sup>55/</sup>

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<sup>50/</sup> CMS Agreement ¶¶ 3.1-3.3; MSD Order at 3962.

<sup>51/</sup> See Jacksonville Cellular Telephone Corporation, 2 FCC Rcd 6416, 6418 (Mobile Serv. Div. 1988) (citing Public Notice, Report No. CL-87-205, released March 12, 1987) ("The Commission's rules permit cellular applicants to enter into agreements whereby the parties contract to grant to each other an irrevocable option to acquire up to a 0.99% share of the winning party's application [subject to the limitation that] the interest represented by the shares so distributed does not exceed 49.99%.").

<sup>52/</sup> CMS Agreement §§ 3.4, 7.1, and 7.2.

<sup>53/</sup> CMS Agreement § 3.4(b); Atlantic City Order at 3932.

<sup>54/</sup> TDS and USCC, Petition for Clarification or Partial Reconsideration, filed July 22, 1988.

<sup>55/</sup> See Bureau Order at 2601; Atlantic City Order at 3932-33.



19. On June 9, 1986, Thompson filed an amendment to his application notifying the Commission of the CMS Agreement, and the names of the minority interest holders.<sup>56/</sup>

3. The Thompson/TDS Option Agreement

20. Following being named tentative selectee, on June 12, 1986 Thompson entered into a letter agreement with TDS ("Thompson/TDS Agreement"). The agreement provided that TDS's subsidiary, United States Cellular Corporation ("USCC"), would--subject to Thompson's control--design, finance, construct and operate the Atlantic City system and granted USCC an option to purchase Thompson's interest in a successor entity that he was to create to hold the Atlantic City license.<sup>57/</sup>

21. Subsequent to the execution of the Thompson/TDS Agreement, on October 2, 1986, the Commission released guidelines regarding real-party-in-interest and transfer of control determinations for the cellular markets beyond the top 120, which include the Atlantic City MSA.<sup>58/</sup> The Commission stated that it would apply the six factor test promulgated in Intermountain to determine the actual locus of control within a cellular applicant or licensee.<sup>59/</sup>

22. In light of the guidelines, and in order to ensure that their agreement was not violative of Commission policy, Thompson and TDS amended the Thompson/TDS Agreement

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<sup>56/</sup> See supra n.34.

<sup>57/</sup> MSD Order at 3962-63.

<sup>58/</sup> Public Notice, 1 FCC Rcd 3 (1986) ("Cellular Control Guidelines").

<sup>59/</sup> Cellular Control Guidelines at 3.

on December 5, 1986. That amendment, among other things, deleted the requirement that USCC be retained to design, finance, construct, and operate the system. On December 9, 1986, Thompson filed an amendment to his application advising the Commission of the deletion of these provisions from the Thompson/TDS Agreement.<sup>60/</sup> Further, Thompson assured the Commission that he would maintain full oversight and control of the system and indicated that he was considering several alternatives for building the optimum system:

One alternative is a turn-key construction contract with Motorola, whereby Motorola will provide the technical expertise necessary to recommend system parameters. A second alternative under discussion with several adjacent cellular operators is the sharing of an existing Mobile Telephone Switching Office (MTSO). This alternative may offer the benefit of a quick start-up of service at a lower initial cost. A third alternative is to negotiate a management agreement with a third party operator other than USCC, whereby Ellis Thompson supervises day-to-day operations which are carried out by a manager acting under his supervision.<sup>61/</sup>

23. Following the filing of the amendment to his application, Thompson began to explore the various alternatives he had outlined for operating his system in anticipation of a grant of his application.<sup>62/</sup> In 1987, the cellular industry had not yet adopted the IS-41 technical protocol which exists today to allow cellular equipment provided by different vendors to "talk to" each other and automatically hand-off subscriber calls across market boundaries.<sup>63/</sup>

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<sup>60/</sup> Amendment of Application of Ellis Thompson. File No. 14261-CL-P-134-A-86, filed December 9, 1986.

<sup>61/</sup> Id. at 2-3.

<sup>62/</sup> Thompson Decl. ¶ 6.

<sup>63/</sup> Villecco Dep. Tr. page 33, lines 1-16. The ability to offer customers the benefits of access to a regional network is a major selling point for a cellular system. In such a network, calls are automatically "handed off" between systems when a mobile telephone crosses a system boundary, just as they are handed off between individual cells of the  
(continued...)

Accordingly, a key issue for Thompson was to find an operating method for Atlantic City compatible with the surrounding markets.<sup>64/</sup> At the time, the non-wireline cellular operators in all of the major markets in the Northeast urban corridor (i.e. Boston, New York, Philadelphia, Baltimore-Washington) were using Motorola switching equipment.<sup>65/</sup>

24. In early 1987, Thompson began discussions with Amcell about the possibility of operating the Atlantic City system using the switching equipment in Amcell's adjacent Wilmington market.<sup>66/</sup> The Wilmington system, as well as Amcell's nearby systems in Long Branch and New Brunswick, New Jersey,<sup>67/</sup> utilized Motorola switching equipment, and thus offered the Atlantic City system compatibility with these and other non-wireline cellular systems throughout the region.<sup>68/</sup>

25. TDS, which was then using Northern Telecom switching equipment in its markets, was concerned about the prospect of Thompson entering into a switching arrangement with

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<sup>63/</sup>(...continued)

same system. In contrast, prior to IS-41, when a user crossed the boundary between systems that were not part of the same network, the call would be dropped. In addition, extra dialing would be required for a user to call or be called when it was a "roamer" in a system not linked in a network with the user's home system. Riley Dep. Tr. page 12, line 20 through page 13, line 9.

<sup>64/</sup> Thompson Decl. ¶ 6.

<sup>65/</sup> Villecco Dep. Tr. page 33, lines 1-16; Lokting Dep. Tr. page 93, lines 7-19; Riley Dep. Tr. page 12, line 9 through page 13, line 9.

<sup>66/</sup> Thompson Decl. ¶ 6.

<sup>67/</sup> Panetta Dep. Tr. page 7, line 17 through page 8 line 4.

<sup>68/</sup> Villecco Dep. Tr. page 32, line 18 through page 33, line 16; Thompson Decl. ¶ 6.

Amcell which might tie TDS into a Motorola network after it exercised its option.<sup>69/</sup> Instead, TDS wanted Thompson to employ Northern Telecom equipment in Atlantic City to ensure the system's compatibility with TDS's markets.<sup>70/</sup>

26. Growing in part out of TDS's desire to have a voice in Thompson's selection of switching equipment for the system, the parties amended the Thompson/TDS Agreement on June 14, 1987 to include a provision, paragraph 16, requiring Thompson (1) to obtain USCC's approval of any agreement relating to the provision of goods or services to the system in excess of \$50,000; and (2) to include a clause in any such agreement permitting TDS to terminate the agreement following TDS's acquisition of the system pursuant to its option.<sup>71/</sup>

27. Paragraph 16 ultimately became a source of great friction between TDS and Amcell. As detailed in Section III(B) below, Amcell petitioned the Commission to grant Thompson's application conditioned on its abrogation and the Commission granted Amcell's request.

#### 4. The Thompson/Amcell Agreements

28. At the time that Thompson's application was pending, Part 22 of the Commission's Rules required construction of at least one cell site within eighteen months from the date that

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<sup>69/</sup> Thompson Decl. ¶ 7.

<sup>70/</sup> Id. at ¶ 7.

<sup>71/</sup> MSD Order at 3963.

station authorization was granted.<sup>72/</sup> Because of the brief time permitted for construction, it was common for tentative selectees in cellular Block A to enter into turn-key construction, switching, and management agreements before their applications were granted.<sup>73/</sup>

29. Throughout 1987, Thompson continued his discussions with Amcell regarding the possibility of operating the Atlantic City system using Amcell's Wilmington switch. As a result of those discussions, on December 30, 1987, Thompson and Amcell entered into an agreement ("Construction and Switching Agreement") which provided that-- subject to Thompson's "oversight and review"-- Amcell would "manage and supervise the initial construction of the system."<sup>74/</sup> In addition, Amcell and Thompson agreed that Amcell would provide switching services for the system through Amcell's existing switch in Wilmington, Delaware.<sup>75/</sup>

30. The final version of the Construction and Switching Agreement was negotiated on behalf of Thompson by David Lokting ("Lokting"). Thompson's independent counsel and business advisor.<sup>76/</sup> Earlier drafts were reviewed and edited by Thompson's FCC counsel, Stuart Feldstein.<sup>77/</sup> The agreement contains a number of provisions negotiated by Thompson,

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<sup>72/</sup> 47 C.F.R. 22.43(c)(2) (1987).

<sup>73/</sup> Riley Dep. Tr. page 13, lines 15-23. See Cellular Control Guidelines at 3. See also Madison Cellular Telephone Company, 2 FCC Rcd 837 (Com. Car. Bur. 1987) ("Madison").

<sup>74/</sup> Thompson Dep. Tr. page 11, line 3 through page 12, line 7; Thompson Dep. Tr. Exhibit 1 (Construction and Switching Agreement), ¶ 1.1

<sup>75/</sup> Id. Exhibit 1 at ¶¶ 2.1-2.6.

<sup>76/</sup> Thompson Dep. Tr. page 11, lines 13-20; Lokting Dep. Tr. page 12, line 24 through page 13, line 1.

<sup>77/</sup> Lokting Dep. Tr. page 13, lines 15-20.

including a guaranteed maximum initial construction cost and the specification that Amcell construct the system using the "best available technology."<sup>78/</sup> Thompson also wanted to ensure that the system be compatible with neighboring markets.<sup>79/</sup> Accordingly, the "Outline System Configuration" attached as Schedule A to the Construction and Switching Agreement specified that the system would be "automatically" part of the "wide area Delaware Valley non-wireline cellular system." In fact, no Delaware Valley regional system formally exists. That phrase was simply a description of the competitive advantage sought by construction of an independent, yet compatible system. The Motorola "DMX" feature permitted inter-system roaming and customer validation among contiguous systems, including the Philadelphia system which was then owned by Metromedia. Finally, Thompson was also concerned that the fee to be charged by Amcell for the Atlantic City system's switching services be set at a reasonable rate. Ultimately, Thompson and Lokting negotiated a rate of \$.05 per minute for use of the Wilmington switch, with the proviso, insisted upon by Thompson, that the rate be lowered if the per minute charge to the

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<sup>78/</sup> Lokting Dep. Tr. page 15, lines 1-13, 17-23. Compare draft agreement (Lokting Dep. Tr. Exhibit 2) with final agreement (Lokting Dep. Tr. Exhibit 1 at 2 and 6).

<sup>79/</sup> Lokting Dep. Tr. Exhibit 1 (Construction and Switching Agreement, as amended). Section 1.8 of the Construction and Switching Agreement provides that "Amcell guarantees that the Budget . . . will not exceed \$1,250,000 to complete construction of the System in accordance with the Design." The "Design" is specified as "the final equipment design and configuration and specifications for the System based on the Outline System Configuration." Thus the Outline System Configuration is tied directly into the guaranteed maximum cost for the system

system's customers for service were to be reduced to less than \$.30 per minute.<sup>80/</sup> Since then, at Thompson's insistence, the rate has been lowered to \$.04/minute.<sup>81/</sup>

31. Thompson believed at that time, and continues to believe, that the Agreement was advantageous for the Atlantic City system for the following reasons:<sup>82/</sup>

- 1) Amcell's proposal to provide switching services from its Wilmington switch offered significant cost savings over the construction of an independent switch for the Atlantic City system. Those savings have been estimated at \$500,000 in annual operating expenses and \$1,500,000 - \$2,000,000 in capital costs.<sup>83/</sup>
- 2) The use of Amcell's pre-existing switch allowed the system to begin operations much earlier than if an independent switch had to be constructed for the system. This was a particularly pressing concern because the system's wireline competitor was already operational and any delay in commencement of the Atlantic City system's operation increased the system's competitive disadvantage.<sup>84/</sup>

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<sup>80/</sup> Lokting Dep. Tr. page 16, line 9 through page 17, line 13; Hillman Dep. Tr. page 62, lines 6-21; Lokting Dep. Tr. Exhibit 1, ¶ 2.2 (Construction and Switching Agreement, as amended).

<sup>81/</sup> Smith Dep. Tr. page 12, line 17 through page 13, line 5.

<sup>82/</sup> Thompson Dep. Tr. page 11, lines 9-12.

<sup>83/</sup> Villecco Dep. Tr. page 44, lines 5-18.

<sup>84/</sup> Thompson Decl. ¶ 10.

3) As previously noted, Amcell's Wilmington system utilized Motorola switching equipment, and thus the Atlantic City system was able, from its inception, to be seamlessly incorporated into the existing Northeast regional non-wireline network.<sup>85/</sup>

32. Switch-sharing agreements were common in the cellular industry at the time.<sup>86/</sup>

33. While Thompson had come to the conclusion that use of Amcell's Wilmington switch was in the system's best interest, he was concerned that TDS might take action adverse to him, either in court or before the FCC, as a result of his entering into the agreement over TDS's objection.<sup>87/</sup> Accordingly, Thompson entered into two other agreements with Amcell simultaneously with the execution of the Construction and Switching Agreement.<sup>88/</sup> Under the first agreement, Amcell agreed to reimburse Thompson for litigation expenses arising from the Construction and Switching Agreement or from any filings made by Amcell relating to the system. Further, Amcell agreed to pay Thompson \$750,000 in the event that Thompson's application was denied as a result of the execution of the Construction and Switching Agreement or as a result of any filing by Amcell with the FCC in connection with the system ("Indemnity Agreement").<sup>89/</sup>

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<sup>85/</sup> Villecco Dep. Tr. page 33, lines 1-16; Riley Dep. Tr. page 12, line 9 through page 13, line 9.

<sup>86/</sup> Riley Dep. Tr. page 13, lines 15-23.

<sup>87/</sup> Thompson Decl. ¶ 15. As it turns out, such fear was justified. As detailed in Section III(B) below, TDS objected to the Construction and Switching Agreement and brought actions against Thompson both before the FCC and in three different courts.

<sup>88/</sup> Id.

<sup>89/</sup> Id.



34. Under the second agreement, Thompson granted Amcell a contingent option to purchase his interest in the Atlantic City system for \$1,500,000, in the event that TDS did not exercise its purchase option ("Contingent Option Agreement").<sup>90/</sup> On May 22, 1990, the Contingent Option Agreement was amended to increase the price of Thompson's interest in the Atlantic City system to \$6,000,000 and to require Amcell to pay \$800,000 upon execution to keep its option open.<sup>91/</sup> In May of 1992, following the Oregon court's grant of summary decision invalidating the TDS option, Thompson and Amcell executed an agreement providing for Thompson's exercise of the Contingent Option Agreement.<sup>92/</sup> Thompson negotiated a provision into the exercise agreement which factors the system's retained earnings into the calculation of the consideration that Amcell will pay for the system at closing.<sup>93/</sup>

## **B. The Regulatory and Civil Battle**

35. For the past eight years, Amcell and TDS have been engaged in an ongoing battle both before the Commission and in the courts over their respective rights vis-a-vis the Atlantic City system.<sup>94/</sup> At the heart of their dispute are two contested contractual provisions: Section 3.4(b) of the CMS Agreement and paragraph 16 of the Thompson/TDS Agreement.

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<sup>90/</sup> Id.

<sup>91/</sup> HDO at 7138.

<sup>92/</sup> See Thompson/Amcell Exercise Agreement (attached hereto as Exhibit 15).

<sup>93/</sup> Id. at § 2(e).

<sup>94/</sup> Atlantic City Order at 3932.

1. MSD Order

36. Prior to its execution in December of 1987, Thompson submitted the Construction and Switching Agreement with Amcell to TDS in accordance with paragraph 16 of the Thompson/TDS Agreement which required TDS's approval of any contract for the system in excess of \$50,000.<sup>95/</sup> TDS refused to consent to the agreement because it believed that the Atlantic City system should construct an independent switch utilizing Northern Telecom equipment rather than rent capacity from Amcell's Motorola-equipped Wilmington switch. Despite TDS's objection, Thompson and Amcell executed the agreement.<sup>96/</sup> On January 11, 1988, Amcell filed a Petition for Conditional Grant of Thompson's application, requesting that the grant of Thompson's then pending application be conditioned on the abrogation of paragraph 16, alleging that it unreasonably interfered with Thompson's ability to control his system.<sup>97/</sup>

37. By order dated June 24, 1988, the then Mobile Services Division of the Common Carrier Bureau authorized Thompson to construct and operate the Atlantic City MSA non-wireline cellular system and granted Amcell's petition that paragraph 16 be abrogated.<sup>98/</sup> The MSD stated that

In this case there is no evidence that Thompson has relinquished control of the proposed cellular operations. Thompson has indicated his independence by entering into an agreement with Amcell which TDS opposes. However, we believe that paragraph 16 of Thompson's agreement with TDS does allow TDS

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<sup>95/</sup> MSD Order at 3963.

<sup>96/</sup> Thompson Decl. ¶ 13.

<sup>97/</sup> MSD Order at 3963.

<sup>98/</sup> Id. at 3964.

to interfere unreasonably with the tentative selectee's business decisions. Thompson must be permitted to exercise business judgments regarding the proposed cellular system free from such interference. Thus, Thompson's application is granted conditioned on the removal of paragraph 16 from the TDS/Thompson Option Agreement.<sup>99</sup>

2. Bureau Order

38. In response to the MSD Order, TDS filed a petition for clarification or partial reconsideration, challenging the abrogation of paragraph 16 of the Thompson/TDS Agreement. In addition, TDS requested that the Commission condition the grant of Thompson's authorization on the abrogation of Section 3.4(b) of the CMS Agreement.<sup>100</sup>

39. As detailed above, Section 3.4(b) of the CMS Agreement provides that any transfer of control of the Atlantic City system requires the approval of owners holding two-thirds of the equity in the system. During 1987 both Amcell and TDS began to acquire the rights to minority interests in the Atlantic City system from parties to the CMS Agreement. Ultimately, Amcell was able to acquire a 36.01 percent interest in the Atlantic City authorization. Subsequently, Amcell informed TDS that, pursuant to Section 3.4(b), Amcell's consent would be required before TDS could exercise its option to purchase the system. TDS objected that Amcell's power to veto Thompson's sale of his system amounted to a usurpation of control of the system.<sup>101</sup>

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<sup>99</sup>/ Id.

<sup>100</sup>/ Bureau Order at 2599.

<sup>101</sup>/ HDO at 7138.

40. By order dated March 28, 1989, the Common Carrier Bureau upheld the MSD's grant of Thompson's application, reaffirming that paragraph 16 constituted a potential infringement of Thompson's control of his system.<sup>102/</sup> The Bureau also found that the supermajority provision of Section 3.4(b) of the CMS Agreement was a reasonable "investor protection" and did not give Amcell, "the power to compel [Thompson] to make major decisions."<sup>103/</sup>

### 3. Atlantic City Order

41. On review before the Commission, TDS supplemented its allegations against Amcell, asserting for the first time that Amcell had assumed de facto control of the Atlantic City system.<sup>104/</sup>

42. In its order, released June 22, 1992, the Commission evaluated the control issue using the criteria set forth in Intermountain, and made explicitly applicable to cellular licensees in the 1986 Cellular Control Guidelines. The Commission found that there were no substantial and material questions of fact suggesting that Thompson had relinquished control of his system. While expressing some concern that Amcell's undertaking to indemnify Thompson if his license was revoked might encourage a lax attitude on the part of the licensee, the Commission found

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<sup>102/</sup> Bureau Order at 2601.

<sup>103/</sup> Id.

<sup>104/</sup> Atlantic City Order at 3932.

that the indemnification provision was not probative of a usurpation of control by Amcell.<sup>105/</sup>

43. Instead, the Commission held that each of Intermountain's six factors pointed to Thompson being firmly in control of his system.<sup>106/</sup> Accordingly, the Commission held that Thompson "has substantially maintained the normal indicia of control of the Atlantic City cellular system."<sup>107/</sup> The Commission also found, once again, that the supermajority veto provision of Section 3.4(b) of the CMS Agreement did not constitute an undue restriction on Thompson's control of his system.<sup>108/</sup> The Atlantic City Order also reaffirmed the abrogation of paragraph 16 of the Thompson/TDS Agreement.

#### 4. TDS's Appeal

44. On June 25, 1992, TDS filed a notice of appeal of the Atlantic City Order with the United States Court of Appeals for the District of Columbia Circuit. TDS sought review of all three determinations made in the Atlantic City Order: (1) that the grant of Thompson's application should be conditioned on the abrogation of paragraph 16 of the Thompson/TDS Agreement; (2) that the grant of the application should not be conditioned on the abrogation of

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<sup>105/</sup> Atlantic City Order at 3935.

<sup>106/</sup> Id.

<sup>107/</sup> Id.

<sup>108/</sup> Id.

the supermajority provision of the CMS Agreement; and (3) that there had not been a transfer of de facto control of the Atlantic City system from Thompson to Amcell.<sup>109/</sup>

45. On March 25, 1994, the D.C. Circuit reversed and remanded the Atlantic City Order. Analyzing only the first four of the six factors, the court was troubled by what it saw as inconsistencies between the Commission's analyses of the Intermountain criteria in the Atlantic City Order and in La Star Cellular Telephone Company,<sup>110/</sup> which the court reviewed contemporaneously.<sup>111/</sup> La Star, which involved questions regarding the control of a cellular applicant, as opposed to an operating system, was reviewed by the D.C. Circuit concurrently with the Atlantic City Order.<sup>112/</sup>

46. Having found that it could not determine whether the Commission correctly applied its precedent in resolution of the transfer of control issue, the Court held that the Commission erred in its application of the Intermountain criteria. Therefore, the D.C. Circuit remanded the case to the Commission for further proceedings with regard to the Intermountain test, in order to "bring its decision into compliance with [Commission] precedent or explain its departure."<sup>113/</sup> It is this remand order which led to the Hearing Designation Order.

## 5. Related Civil Litigation

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<sup>109/</sup> TDS v. FCC at 46.

<sup>110/</sup> 7 FCC Rcd 3762 (1992) ("La Star").

<sup>111/</sup> TDS v. FCC at 50.

<sup>112/</sup> Telephone and Data Systems v. FCC, 19 F.3d 655 (D.C. Cir. 1994).

<sup>113/</sup> Id.

47. In addition to proceedings before the Commission, Amcell, TDS and Thompson have also litigated their disputes over the contested contractual provisions in various courts. On February 2, 1988, TDS and USCC sued Amcell in the United States District Court for the District of Columbia. TDS alleged that Amcell had tortiously interfered with its contractual and business relations by entering into the Construction and Switching Agreement with Thompson in violation of paragraph 16 of the Thompson/TDS Agreement. On July 7, 1988, TDS amended its complaint to add five additional unrelated counts. On September 6, 1988, the court dismissed TDS's original tortious interference claims on the grounds that the claims were barred by the MSD Order invalidating paragraph 16, which was entitled to its full res judicata effect. In late 1990, TDS agreed to dismiss the remaining counts and final judgment was entered. Thereafter, TDS filed a notice of appeal of the District Court's dismissal of its tortious interference claims in the United States Court of Appeals for the District of Columbia Circuit. On July 10, 1992, the Court of Appeals reversed and remanded the District Court's decision. On December 17, 1993, however, the District Court granted Amcell's Motion to Dismiss on the basis of the preclusive effect of the Oregon judgment described below.<sup>114/</sup>

48. In 1990, Thompson and ETC filed suit in the Circuit Court of Multnomah County, Oregon, seeking a declaratory ruling that the TDS option to acquire the Atlantic City system was void and unenforceable. TDS and USCC filed a counter-claim and a cross-claim against Amcell, which was also a named defendant, in which it sought specific performance of the TDS Option

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<sup>114/</sup> Telephone and Data Systems, Inc. and United States Cellular Corp. v. American Cellular Network Corp. and Amcell of Atlantic City, Inc., Civil No. 88-0264 (D.D.C. 1988).

Agreement with Thompson, as well as damages arising out of Amcell's allegedly unlawful interference with TDS's contractual rights. On April 10, 1992, the Circuit Court granted judgment in favor of Thompson, ETC, and Amcell. The court held that the TDS option agreement was invalid because it could not be reconciled with the terms of the CMS Agreement. On April 23, 1992, TDS appealed the trial court's ruling to the Oregon Court of Appeals. On September 14, 1994, that court reversed the Circuit Court's decision on procedural grounds and remanded the case for further proceedings.<sup>115/</sup>

49. On March 23, 1995, Thompson, Amcell and TDS entered into a comprehensive settlement agreement, looking toward resolution of all their outstanding civil claims against one another, subject to the outcome of the instant proceeding and grant of Thompson's pending application to transfer control of ETC to Amcell. The agreement does not affect the proceeding before the Commission and therefore did not require Commission approval. On March 28, 1995, the parties informed the Presiding Judge of the settlement by letter.<sup>116/</sup>

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<sup>115/</sup> Ellis Thompson and Ellis Thompson Corp. v. Telephone & Data Systems, Inc., United States Cellular Corp., and Amcell of Atlantic City, Inc., No. 9005-03082 (Multnomah County Cir. Ct. 1990). In response to the suit filed by Thompson, TDS and USCC also filed a second suit in the United States District Court for the Northern District of Illinois, Eastern Division, alleging "tortious interference with contractual relations" and other unlawful acts and seeking injunctive relief and \$100,000,000 in punitive damages. On July 29, 1991, however, the District Court dismissed TDS's complaint on jurisdictional grounds, and the time for TDS to have appealed has expired. Telephone and Data Systems, Inc. and United States Cellular Corp. v. Ellis Thompson, Ellis Thompson Corp., American Cellular Network Corp. and Amcell of Atlantic City, Inc., No. 90C4245 (N.D. Ill. 1991).

<sup>116/</sup> Letter from Louis Gurman, et al. to Administrative Law Judge Chachkin of March 28, 1995.



**C. Construction of the System and the Licensee Period (1988 - Present)**

1. Construction of the System and System Operations

50. While TDS and Amcell were engaged in their judicial and regulatory battles concerning the Atlantic City system, Thompson began to make preparations to construct the system. At that time it became apparent to Thompson that the system would require a competent, on-site management team to carry out the day-to-day operation of the system.<sup>117/</sup> Lacking the knowledge and experience to do so himself, Thompson, after consulting with his attorney and business advisor, David Lokting, determined that it would be necessary to contract with a third-party for management services.<sup>118/</sup>

51. After considering several different options, Thompson selected Amcell to manage the system.<sup>119/</sup> Thompson believed at the time, and continues to believe, that Amcell was the logical choice for the following reasons:

- 1) Amcell, as a minority interest holder in the system, would have every incentive to maximize revenues and minimize expenses.
- 2) Amcell was the owner of three nearby systems, and was then a major reseller on the wireline system in Atlantic City. It thus knew the market, knew the competition, and had an experienced marketing and administrative team already in place.

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<sup>117/</sup> Thompson Decl. ¶ 17.

<sup>118/</sup> Id.

<sup>119/</sup> Thompson Dep. Tr. page 11, lines 3-12 and page 12, lines 11-25; Thompson Decl. ¶ 21.